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No. 92-1865

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM JUSTIN DELEONARDIS, PETITIONER

v.

KATHLEEN DAY KOCH, SPECIAL COUNSEL,
OFFICE OF THE SPECIAL COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly rejected petitioner's attempt to obtain judicial review of a decision by the Office of Special Counsel that further investigation of petitioner's allegation of prohibited personnel practices was not "appropriate" under 5 U.S.C. 1212(a)(2) (Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 986 F.2d 725. The opinion of the district court (Pet. App. 10a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1993. A petition for rehearing was denied on March 2, 1993. Pet. App. 17a. The petition for a writ of certiorari was filed on April 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Office of Special Counsel (OSC) was established by the Civil Service Reform Act of 1978. As amended in 1989, the Act vests the OSC with responsibility for protecting federal employees from, and investigating claims of, prohibited personnel practices. 5 U.S.C. 1212 (Supp. IV 1992), 2302 (1988 & Supp. IV 1992). Under the Act, the OSC receives and investigates allegations of prohibited personnel practices and, "where appropriate," (i) files a petition either to stay the personnel action or to obtain corrective action, (ii) files a complaint with the Merit Systems Protection Board, or (iii) seeks disciplinary action. 5 U.S.C. 1212 (Supp. IV 1992).

When the OSC receives an allegation of a prohibited personnel practice, it must investigate the charge "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." 5 U.S.C. 1214(a)(1)(A) (Supp. IV 1992). If the OSC decides to terminate an investigation, it must provide the complainant with written notification that the investigation has closed, summarizing the facts of the case and the reasons for ending the investigation. 5 U.S.C. 1214(a)(2)(A) (Supp. IV 1992). On the other hand, if the OSC has reasonable grounds to believe that a prohibited personnel practice has occurred, it may petition the Merit Systems Protection Board for corrective action. 5 U.S.C. 1214(b)(2)(A) and (B) (Supp. IV 1992).

Government attorneys like petitioner generally fall within the "excepted" civil service. 5 U.S.C. 2103. During the time period relevant to this case, excepted

service members could challenge demotion decisions only by presenting a complaint to the OSC, which then determined whether a proceeding before the Merit Systems Protection Board was warranted. If the OSC elected not to proceed further, the excepted service employee could not independently seek relief from the Board. See *United States* v. *Fausto*, 484 U.S. 439, 446-447 (1988).[1]

2. Petitioner was a Supervisory Attorney Advisor with the Office of Hearings and Appeals of the Social Security Administration in the Department of Health and Human Services. In 1988, petitioner recommended that a particular individual be hired as a staff attorney. The individual was hired, but his work as a staff attorney proved unsatisfactory. Eventually, petitioner recommended that the staff attorney be dismissed. Resp. C.A. Br. 7-9; SRE 1, 4-5.[2] The attorney responded by leveling a sexual harassment charge against petitioner, who is a homosexual. Petitioner's supervisor upheld the termination of the staff attorney. Pet. 4.

Following the attorney's termination, petitioner was demoted. The demotion letter informed petitioner that "your lack of judgment and discretion in

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[1] Congress has since amended the Act to permit members of the excepted service to appeal adverse personnel actions to the Board independently of the OSC. See Civil Service Due Process Amendments, Pub. L. No. 101-376, § 2(a), 104 Stat. 462. Those amendments apply to personnel actions taken on or after August 17, 1990. *Id.* § 2(c), 104 Stat. 462.

[2] "SRE" refers to the Supplemental Record Excerpts filed by respondent in the court of appeals. "RE" refers to the Record Excerpts filed by petitioner in the court of appeals.

dealing with a subordinate employee * * * calls into question your ability to function in a supervisory capacity," and that "[y]our failure to perform your supervisory responsibilities was more than a harmless lapse or inadvertent omission. It is more aptly characterized as deliberate conduct." SRE at 1-2; see Resp. C.A. Br. 10. Before demoting petitioner, his supervisor allegedly made inquiries concerning petitioner's homosexuality and his publication of a sexually explicit article in a gay magazine. RE Tab 5, at 70.

3. After exhausting his intra-agency grievance rights, petitioner filed a complaint with the OSC, alleging that his demotion was the result of prohibited personnel practices. Pet. App. 10a-11a. In particular, petitioner claimed that his demotion was the result of his status as a homosexual and his publication of an article in a gay magazine. RE Tab 5, at 66-67.

Petitioner's complaint was assigned to an OSC investigator, who reviewed all of the documentation submitted by petitioner and interviewed him over the telephone. The investigator then prepared a summary of the case and a recommendation. The Chief of the Complaints Examining Unit, the Deputy Associate Special Counsel for Prosecution, the Associate Special Counsel for Prosecution, and the Associate Special Counsel for Investigation all reviewed the summary and recommendation, and determined that further investigation was unwarranted. Resp. C.A. Br. 13-14; RE Tab 4, at 10. In November 1990, the OSC informed petitioner that it had "found insufficient evidence of any prohibited personnel practices

or other violations warranting further inquiry by this Office." *Id.* at 9.

4. Petitioner then filed this suit in the United States District Court for the Southern District of Texas seeking to compel the OSC to conduct a full investigation of his claims. Pet. App. 12a. Petitioner alleged that the OSC had failed to conduct an adequate investigation of his claims as mandated by 5 U.S.C. 1214 (Supp. IV 1992) in that it had ignored relevant evidence and applied the wrong legal standard. Pet. App. 12a.

While the case was pending before the district court, petitioner entered into a settlement agreement with the Department of Health and Human Services. Under the terms of the settlement, petitioner's demotion was changed to a voluntary reduction in grade. All documentation and records pertaining to the demotion were purged from petitioner's personnel file and replaced with papers indicating a voluntary grade change. Petitioner was restored to approximately his prior pay level and received back pay, attorney's fees, additional office space, and a personal computer. The settlement agreement expressly reserved petitioner's right to pursue the instant litigation. Pet. App. 3a, 13a. In exchange, petitioner waived all causes of action against the Department of Health and Human Services arising from the facts giving rise to his original complaint. Resp. C.A. Br. 16; SRE 9.

In July 1992, the district court granted summary judgment for respondent. Pet. App. 10a-16a. The district court held that, while a court may compel the OSC to conduct an initial investigation, it may not

review the OSC's decision to terminate that investigation or its refusal to petition the Merit Systems Protection Board on behalf of a complaining employee. *Id.* at 15a. Because petitioner "d[id] not contend that OSC failed to investigate his complaint," but instead contended only that "the investigation was inadequate," the district court held that it lacked authority to order further inquiry or to "second guess" the OSC's decision. *Ibid.*

5. The court of appeals affirmed. Pet. App. 1a-8a. The court stated that "[w]e agree with our colleagues of the D.C. Circuit that when the OSC decides to terminate an investigation that it began pursuant to a complaint, the decision is not reviewable." *Id.* at 5a (citing *Wren* v. *Merit Sys. Protection Bd.*, 681 F.2d 867, 874-875 & n.9 (D.C. Cir. 1982)). Accordingly, the court of appeals held that the district court properly denied petitioner's attempt to obtain judicial review of the OSC's decision to terminate the investigation.

The court of appeals also ruled, in the alternative, that petitioner's appeal was rendered moot by his settlement agreement with the Department of Health and Human Services. Pet. App. 6a-7a. "The fatal problem with [petitioner's] argument," the court explained, "is that he asks us to require the OSC to do something that he has rendered it unable to do—investigate an incident that he has contracted to have expunged from the [Social Security Administration's] files. * * * [H]e seeks in this lawsuit to compel an agency to do something that he has made impossible." *Id.* at 7a.

ARGUMENT

Under 5 U.S.C. 1214(a)(1)(A) (Supp. IV 1992), the OSC is required to investigate allegations of a prohibited personnel practice "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." The courts of appeals have uniformly recognized that judicial review of the OSC's resolution of employee complaints is limited to ensuring that such an investigation was undertaken. Courts may not scrutinize or second-guess the merits of the OSC's determination concerning the existence of a prohibited personnel practice. *Spagnola* v. *Mathis*, 859 F.2d 223, 225 (D.C. Cir. 1988) (en banc) (per curiam); *Towers* v. *Horner*, 791 F.2d 1244, 1246 (5th Cir. 1986); *Pinar* v. *Dole*, 747 F.2d 899, 906 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Wren* v. *Merit Sys. Protection Bd.*, 681 F.2d 867, 875 n.9 (D.C. Cir. 1982) ("[i]t is also quite clear from the statutory language and corresponding legislative history that Congress did not mean to make the OSC's decisions to terminate or conduct an investigation or bring a proceeding before the Board reviewable on the merits").

The decision of the court of appeals in this case is fully in accord with that line of authority. The court expressly adopted the district court's determination that the OSC "conducted a preliminary investigation of plaintiff's allegations" and then concluded that the evidence did not warrant further inquiry or proceedings. Pet. App. 5a. Because the OSC fulfilled its duty to conduct an initial investigation, the court's inquiry was at an end. Like the courts in

Spagnola, *Towers*, *Pinar*, and *Wren*, the court of appeals refused to go further and "look behind substantive OSC determinations to terminate investigations." Pet. App. 6a.

1. Petitioner nevertheless contends (Pet. 6-9) that the court of appeals' refusal to review the OSC's decision conflicts with *Wren* and *Pinar*, which held that the OSC is required to conduct an initial investigation of all non-frivolous complaints. Petitioner's contention is incorrect.

Petitioner predicates his claim of a circuit conflict on the assertion that the OSC undertook no investigation at all in this case. See Pet. 6, 9. The record reveals, however, and both courts below found, that the OSC did in fact conduct an initial investigation of petitioner's claims. Petitioner does not deny that the OSC investigator received and reviewed all of petitioner's submitted evidence, interviewed petitioner, and then met with superiors to discuss the case before issuing a final decision. Indeed, the court of appeals specifically adopted the district court's statement that "[p]laintiff *does not contend that OSC failed to investigate his complaint*; he contends that the investigation was inadequate." Pet. App. 5a (emphasis added).

Thus, the decision below is entirely consistent with *Wren* and *Pinar*, because the OSC did undertake the preliminary investigation called for by those cases and both courts below rested their decisions on that premise. There is no circuit conflict, and further review is not warranted.

2. Petitioner also errs in contending (Pet. 12-14) that the court of appeals' ruling departs from this

Court's precedent. According to petitioner, the court of appeals ignored established principles of administrative law authorizing courts to correct legal errors in agency decisionmaking.

Petitioner's argument rests on a false premise. The cases cited by petitioner all involved agency decisions that were properly subject to judicial review; in that context, courts may appropriately set aside agency decisions that are predicated upon an erroneous understanding of the law. Petitioner implicitly assumes that the same is true of the OSC's post-investigation decision not to proceed further in his case, but neither this Court nor any court of appeals has held that decisions of that nature are subject to judicial review. To the contrary, every court of appeals to address the question has indicated that such decisions are committed to the unreviewable discretion of the OSC. See, *e.g.*, *Spagnola*, 859 F.2d at 225; *Towers*, 791 F.2d at 1246; *Pinar*, 747 F.2d at 906; *Wren*, 681 F.2d at 875 n.9. Accordingly, the decision below is not inconsistent with the cases cited by petitioner.

3. Petitioner contends (Pet. 14-18) that the court of appeals' decision is erroneous because it fails to afford a judicial forum for review of his constitutional claims. That contention is without merit.

Petitioner has never argued that the OSC's actions in investigating and deciding not to pursue his complaint were unconstitutional. Petitioner accused the Department of Health and Human Services, not the OSC, of violating his constitutional rights by demoting him for impermissible reasons. Thus, the court of appeals did not deny petitioner a judicial

forum in which to litigate his constitutional claims those claims were never at issue in this lawsuit against the OSC, and in any event petitioner waived them when he entered into the settlement agreement with the Department of Health and Human Services The court of appeals correctly recognized that petitioner cannot transform his former claims against the Department into a basis for expanded judicial oversight of the OSC.

4. Review by this Court is unwarranted for two additional reasons, independent of the merits of petitioner's challenge to the OSC's investigation.

a. First, as petitioner acknowledges (Pet. 4), after the events in this case, Congress amended the Civil Service Reform Act to afford employees (such as petitioner) in the excepted service a right of appeal to the Merit Systems Protection Board. See note 1, *supra*. The ability of employees in petitioner's position to seek review in their own right diminishes the practical significance of the preclusion of judicial review of a decision by the OSC not to intervene on their behalf.

b. Second, as the court of appeals recognized (Pet. App. 6a-7a), petitioner's settlement agreement with the Department of Health and Human Services renders this case moot. The settlement agreement entered into between petitioner and the Department restored petitioner to approximately his same salary, and provided backpay, attorney's fees, and other benefits to petitioner in exchange for petitioner's waiver of all claims against the Department. SRE 9-10. As a result of the settlement agreement, no trace of the challenged personnel action remains. Pet. App.

3a, 13a. Petitioner's personnel file reveals only a voluntary change in grade.

The settlement vitiated the entire basis for petitioner's complaint against the OSC. There is now no challenged personnel action for the OSC to investigate. Nor are there any records that the OSC could review, beyond those already submitted by petitioner and found insufficient by the OSC. The OSC has no authority to investigate voluntary changes in employment status, especially when, as here, no complaint has been filed concerning the voluntary action. Furthermore, the OSC is statutorily prohibited from rendering advisory opinions. 5 U.S.C. 1212(f) (Supp. IV 1992); see also 5 C.F.R. 1800.3.

The court of appeals' finding that the settlement agreement rendered petitioner's appeal moot is consistent with decisions of other courts. See *Frazier* v. *Merit Sys. Protection Bd.*, 672 F.2d 150, 160-161 (D.C. Cir. 1982) (agency's cancellation of challenged reassignment renders case moot); *Pope* v. *Bond*, 613 F. Supp. 708, 712 (D.D.C. 1985) (agency's rescission of removal and expunging of records moots prohibited personnel practices claim). Petitioner does not suggest that this aspect of the court of appeals' ruling is inconsistent with decisions of this Court or creates a conflict in the circuits. Accordingly, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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